Decision 04-03-044 March 16, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks | Rulemaking 93-04-003 (Filed April 7, 1993) |
| Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks | Investigation 93-04-002 (Filed April 7, 1993) **(Permanent Line Sharing Phase)** |

# ORDER GRANTING STAY OF DECISION 03-01-077

## I. SUMMARY

In this decision we hereby order a stay of Decision (D.) 03-01-077. We find that a stay is warranted pending the resolution of ongoing litigation regarding the offering of line sharing as an unbundled network element. In doing so, we are not ruling on the merits of the applications for rehearing of D.03-01-077 filed by Verizon California or The Utility Reform Network, nor are we ruling on the merits of Southern Bell Company's (SBC's) motion for a stay of that decision. Rather, we find that given the legal uncertainties surrounding the line sharing issue, it would be prudent to stay our decision at this time.

## II. PROCEDURAL BACKGROUND AND DISCUSSION

On December 9, 1999, the Federal Communications Commission (FCC) released a decision requiring incumbent local exchange carriers (ILECs) to allow CLECs

access to the high frequency portion of the local loop.[1] The FCC found that the High Frequency Portion of the Loop (HFPL) met the statutory definition of a network element, and unbundled it pursuant to §§ 251(d)(2) and 251(c)(3) of the 1996 Telecommunications Act (Act). The FCC encouraged states to issue interim arbitration awards setting out the necessary rates, terms, and conditions for access to this UNE. This Commission opened a new phase of the Open Access and Network Architecture Development (OANAD) proceeding to establish terms and conditions for access to the HFPL, and concluded the interim arbitration phase in September 2000 with D.00-09-074. On May 24, 2002, with our permanent phase well underway, the D.C. Circuit Court vacated and remanded the FCC's Line Sharing Order.[2] We continued with our proceeding, and on January 30, 2003, we adopted D.03-01-077, Interim Opinion Establishing a Permanent Rate for the High-Frequency Portion of the Loop. In that decision, we ordered Pacific Bell Telephone Company (now SBC) and Verizon California Inc. (Verizon) to offer the line sharing unbundled network element (UNE). We also adopted a permanent UNE rate of $0 for the High Frequency Portion of the Loop (HFPL) for both SBC and Verizon.

In response to USTA I, the FCC again revised its unbundling rules and issued its Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (Triennial Review Order) on August 21, 2003. In this order, the FCC decided to reverse its earlier position on line sharing and eliminated this unbundling mandate. The FCC rejected its prior finding that lack of separate access to the HFPL would cause impairment. The FCC also observed that many states had priced the HFPL at approximately zero, which, according to the FCC, distorted competitive incentives, discouraged innovative arrangements between voice and data CLECs, and discouraged product differentiation between ILEC and CLEC offerings. Thus, the FCC found that mandatory line sharing was contrary to the Act's pro-competitive goals. In addition, the

[1] Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 98-147 and 96-98, FCC 99-355, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, Released Dec. 9, 1999 (Line Sharing Order).

[2] United States Telecom Association v. FCC, 290 F.3d 415 (D.C. Cir. 2002) (USTA I).

FCC found substantial competition from cable companies lessened any competitive benefits associated with line sharing. The FCC established a three year transition period, whereby CLECs must transition their existing customer base served via the HFPL to new arrangements, with the price for the HFPL increasing incrementally towards the cost of the loop in the relevant market.

The FCC's Triennial Review Order was quickly challenged in the D.C. Circuit Court. On March 2, 2004, the D.C. Circuit issued its opinion and once again struck down much of the FCC's Order. See, United States Telecom Association v. Federal Communications Commission, et al., No. 00-1012 (March 2, 2004 D.C. Cir.) (USTA II). However, with regard to line sharing, the D.C. Circuit determined that the FCC's rules were reasonable and supported by evidence in the record, and therefore upheld those rules. The D.C. Circuit also found that state petitioners' challenge to the preemptive scope of the Triennial Review Order was not ripe for review, and held that the general prediction voiced in paragraph 195 of the Triennial Review Order does not constitute final agency action, as the FCC has not taken any view on any attempted state unbundling order. We do not know at this time whether the U.S. Supreme Court will grant certiorari to review the D.C. Circuit decision.

In the meantime, on March 6, 2003, both Verizon and The Utility Reform Network (TURN) filed timely applications for rehearing of D.03-01-077, albeit for different reasons. Verizon alleges that the Commission lacks authority under state and federal law to order line sharing as a UNE. Verizon also claims that the zero price for the HFPL is contrary to FCC rules. TURN supports the Decision's conclusion that the HFPL be offered as a UNE, but argues that the zero price violates the FCC's UNE pricing rules, specifically 47 C.F.R. § 51.505(c), as well as § 254(k) of the Act. SBC filed a motion for a stay of the Decision on February 13, 2003, although it did not file an application for rehearing of the Decision. The applications for rehearing were filed after the FCC adopted the new unbundling rules, but before those rules were released and the contents made public. SBC also filed an action against this Commission in federal district court on

April 24, 2003. See Pacific Bell v. CPUC, et al., Case No. 03-1850 SI. That action is still pending.

We do not rule on the merits of these pleadings at this time. Rather, in light of the legal uncertainties and pending litigation on the line sharing issue, we believe there is good cause to stay D.03-01-077 until further order of the Commission. We will therefore stay D.03-01-077 until 60 days after the U.S. Supreme Court issues a decision as to whether it will grant or deny certiorari to review the USTA II case, or until further order of this Commission, whichever comes first.

Therefore **IT IS ORDERED** that:

1. Decision 03-01-077 is stayed until 60 days after the U.S. Supreme Court issues a decision as to whether it will grant or deny certiorari to review the USTA II case (No. 00-1012 (March 2, 2004 D.C. Cir.)), or until further order of this Commission, whichever comes first.

This order is effective today.

Dated March 16, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

I dissent.

/s/ LORETTA M. LYNCH

LORETTA M. LYNCH
Commissioner

I dissent.

/s/ SUSAN P. KENNEDY

SUSAN P. KENNEDY
Commissioner